

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

IN THE MATTER OF:

2 Dogs, Inc., dba
Columbia Liquors
License No. AA-00674
Located at Grand Forks
Grand Forks, North Dakota

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**RECOMMENDED
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

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The licensee, 2 Dogs, Inc., was served with a Complaint and Specification of Issues and Notice of Hearing as required by N.D.C.C. ch. 5-02. This administrative matter was heard on July 16, 2003, at the hour of 1:00 p.m., at the Grand Forks County Courthouse, Grand Forks, North Dakota, before Allen C. Hoberg, designated administrative law judge (ALJ), Office of Administrative Hearings. Mr. Douglas Broden, Devils Lake, represented the licensee at the hearing. The licensee was present at the hearing by one of its shareholders, and the manager of Columbia Liquors, Bryan Hoime. The State was represented by Assistant Attorney General, Robert P. Bennett. Four witnesses testified at the hearing, two law enforcement personnel, Mr. Hoime, and a former employee of the licensee. The State offered two exhibits as evidence at the hearing (exhibits 1-2), both of which were admitted (exhibits marked on blue stickers). The Licensee offered two exhibits as evidence at the hearing (exhibits 3-4), both of which were admitted (exhibits marked on blue stickers, number plus "R"). Exhibit 4 is a tape which the ALJ has reviewed in its entirety. The ALJ also took official notice of several documents, including the original Complaint and Specification of Issues and the Licensee's answer to the Complaint, which are the procedural history of this matter.

Mr. Bennett and Mr. Broden gave oral closing argument at the hearing.

NOW, THEREFORE, upon the evidence presented at the hearing and the argument of counsel for the parties, the ALJ makes the following recommended findings of fact and conclusions of law:

FINDINGS OF FACT

On March 31, 2003, 2 Dogs, Inc. was the holder of a state alcoholic beverage license permitting the sale of alcoholic beverages at retail from the premises of Columbia Liquors, located in Grand Forks, North Dakota, Licensee No. AA-00674. 2 Dogs, Inc. is a corporation of which Bryan Hoime is a shareholder. 2 Dogs, Inc. does its alcoholic beverage business in North Dakota as Columbia Liquors. Hoime is the manager of Columbia Liquors. Columbia Liquors retails off sale liquor only.

Hoime was the only person working at Columbia Liquors on the evening of March 31, 2003, when the sale of alcoholic beverages that is the subject of this matter took place ("sale"). However, a former employee, Darin Ramstad, was also present on the premises on the evening of March 31, 2003, at the time the sale took place. Hoime specifically asked Ramstad to handle customers while Hoime looked for Ramstad's tax records. Ramstad had come to Columbia Liquors that evening only to obtain tax records from Columbia Liquors.

The evidence shows, by the greater weight of the evidence, that on March 31, 2003, the licensee, acting by and through Mr. Hoime and, specifically, Mr. Ramstad, dispensed alcoholic beverages from Columbia Liquors to a person under twenty-one years of age and permitted that same person to remain on the licensed premises of Columbia Liquors while alcoholic beverages were being sold or displayed. There is really no dispute as to this fact, a fact essentially admitted by both Hoime and Ramstad, that Ramstad at Hoime's behest did dispense alcoholic beverages to a minor on the licensed premises.

ANALYSIS

There is no doubt that a minor entered the premises of Columbia Liquors on March 31, 2003. There is not doubt that on that date Ramstad dispensed alcoholic beverages to the minor on the licensed premises after asking for identification which the minor provided.

The evidence shows that the minor was 16 years of age. The evidence shows that the minor produced identification (exhibit 2), but at the hearing Ramstad said he believes that the ID shown was not that of exhibit 2, though Ramstad also said he is not certain about what he actually saw. In other words, Ramstad affirmed that it is possible that the ID shown that night and the ID of exhibit 2 are the same. Ramstad thought, though, that he would not have sold to the minor if he had seen the ID of exhibit 2 because the minor looked so young on the ID.

The evidence does not show that on March 31, 2003, the minor was asked to write in a book showing the date of the purchase, the identification used in making the purchase and the appropriate numbers of such identification, the address of the purchaser, and the purchaser's signature. A book containing such information is commonly referred to as a "bar book." No one testified about whether the Licensee even had a bar book on the premises.

The appearance of the minor on March 31, 2002, was not such that an ordinary and prudent person would believe the minor to be of legal age to purchase alcoholic beverages in North Dakota, *i.e.*, 21 years of age. Again, even Ramstad testified at the hearing that on the date of the sale the minor did not appear to be twenty-one years of age. It is very obvious that the minor, both as he looked on the date of the sale (*see* photograph taken that night, exhibit 2) and as he looked on his drivers license picture issued April 23, 2002 (*see* copy of drivers license,

exhibit 2), does not appear to be twenty-one years of age. The minor appears to be much younger than 18 years of age. The minor turned 16 years of age on March 3, 2003.

This matter resulted from a "sting operation" conducted by the City of Grand Forks (*see* testimony of two law enforcement officers and exhibit 3). Although the licensee objects to the operation as being unfair, at least as to the method of conducting the sting operation at Columbia Liquors that evening, the ALJ finds no unfairness. The conduct of the operation was not flawed. Sting operations are common in Grand Forks and the alcoholic beverage retailers know that they are occurring.

Although the licensee in this matter attempts to show that there may have been another ID shown by the minor than the ID on the exhibit admitted as exhibit 2, the ALJ believes that another ID was not shown. In any event, under the law, it does not make a difference. The facts show, by the greater weight of the evidence, that the State proved its case as alleged in the Complaint.

From the foregoing findings of fact, the ALJ arrives at the following:

CONCLUSIONS OF LAW

2 Dogs, Inc. is presently a licensed retailer of alcoholic beverages, operating under and by virtue of a state license to sell alcoholic beverages at retail, the license having been issued by the Attorney General pursuant to the provisions of N.D.C.C. ch. 5-02.

The evidence presented at the hearing shows, by the greater weight of the evidence, that the licensee, acting by and through its agent, Darin Ramstad, on March 31, 2003, did dispense alcoholic beverages to a person under the age of 21 years, and allowed that same person to remain on the licensed premises while alcoholic beverages were being sold or displayed, in violation of N.D.C.C. § 5-02-06.

N.D.C.C. § 5-01-08.2 is not a valid defense in this matter because the minor did not appear to be 21 years of age at the time of the purchase. No ordinary and prudent person would believe the minor to be 21 years of age. All three elements of the provisions of N.D.C.C. § 5-01-08.2 must be established for a valid defense. *State v. Smokey's Steakhouse, Inc.*, 478 N.W. 2d 361 (N.D. 1991). The ALJ believes that *Smokey's* applies to this matter. He can see no practical or legal distinction between this matter where the minor was part of a sting operation and a situation where the minor was acting on his own. The licensee did not establish any of the necessary elements of N.D.C.C. § 5-01-08.2 at the hearing. However, even if the evidence had shown that the licensee established that the minor falsely represented himself with a false ID, the other two elements of N.D.C.C. § 5-01-08.2 were clearly not established. N.D.C.C. § 5-01-08.2(2), and (3). Moreover, a licensee that does not keep a book of the kind required by N.D.C.C. § 5-01-08.1 (a bar book) may not avail itself of the provisions of § 5-01-08.2. Those two sections must be considered together. *Ross v. Scott*, 386 N.W. 2d 18 (N.D. 1986). There was no evidence presented regarding the keeping of a bar book or its use in this matter.

There was no other defense presented by the Licensee except a general defense of a denial of due process because of the unfairness of the sting operation in this matter. The ALJ does not believe that the evidence shows there was any unfairness, but he has no authority to act on a due process claim. See e.g., *First Bank of Buffalo v. Conrad*, 350 N.W. 2d 580 (N.D. 1984).

The Attorney General has the authority, by virtue of N.D.C.C. § 5-02-11, to suspend or revoke the licensee's license to sell alcoholic beverages at retail when the violation charged in the affidavit of Complaint has been proved by the evidence presented at the hearing.

RECOMMENDED ORDER

THEREFORE, upon the foregoing findings of fact and conclusions of law, showing a violation of N.D.C.C. Title 5, the state retail alcoholic beverage license of 2 Dogs, Inc., d/b/a Columbia Liquors, is suspended for a period of five business days, but only one business day of the suspension shall be invoked at the present time, and the actual business day of closing shall be determined by the Attorney General in his final Order.

Dated at Bismarck, North Dakota this 23rd day of July, 2003.

State of North Dakota
Wayne Stenehjem
Attorney General

By: _____
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Administrative Law Judge
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